No. 2737.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation,

Appellants,

vs.

Citizens Trust & Savings Bank, a corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt,

Appellee.

Reply Brief of Appellees The Miller Rubber Company and The Miller Rubber Company of California.

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We are filing this reply brief to assist the court so far as possible to clearly determine the issues herein, by more specifically showing the points raised and decided in the cases cited herein.

1911 Contract.

The trustee claims:

(a) That the giving of notes vested title in the bankrupt.

(b) That the bankrupt dictated the prices.

(c) That the bankrupt mingled the goods with his own.

(d) That there was no agreement that the accounts and bills receivable should belong to consignor.

(e) That some of the cases cited in the opening brief of The Miller Rubber Company and The Miller Rubber Company of California were decided prior to the amendment of 1910 to section 47, clause 2, subdivision a.

(f) That said conditions stamped the 1911 contract as a fraud upon the creditors of the bankrupt.

We will discuss these points as determined by the cases we have cited.

In re Galt, 120 Fed. 64 (U. S. C. C. A., Seventh Circuit).

(a) Galt guaranteed the notes, and if not paid in two months to "take up the same, and pay the cash to" petitioner. If not sold within twelve months, at the option of petitioner, the bankrupt to pay cash for said wagons or give his note, due in four months, therefor. As to this the court on page 69 say:

> "The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash, or to store, subject to the order of the company, the goods not sold within 12

months, is probably the strongest clause in the contract to indicate a sale; but, as suggested by the Supreme Court of Illinois in Lenz v. Harrison, *supra,* while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell, and report sales within the time stated."

(b) No agreement limiting prices.

(c) No showing that the books were kept separately from the bankrupts.

(d) Proceeds of sale belonged to consignor.

(e) Case decided in 1903. It must be conceded that the United States courts in these matters have always followed the state decisions upon the subject, and so followed in that case. The law of that state held *conditional sales* void as to *bona fide* purchasers and attaching creditors. There was no such law as to bailments. Therefore, at that time—1903—a bailment contract was good as against the world, and necessarily was so held by the Circuit Court of Appeals.

The amendment of 1910 to section 47, clause 2, subdivision a, vests the trustee with all the "powers of a creditor holding a lien"; and also "with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

In re Flanders, 134 Fed. 560 (U. S. C. C. A., Seventh Circuit).

(a) Flanders advanced 50%, said advances being made by his notes payable to the leather company.

(b) Flanders dictated the prices.

(c) Flanders kept the goods in separate bins so far as practicable.

(d) Flanders was to account monthly for the proceeds of the sales, deducting freight charges and advances.

(e) Case decided in 1905. This case arose in Illinois, as the preceding one did, the court held it to be a *bailment,* and under the law of Illinois it was good as against attaching or execution creditors.

The amendment of 1910 to section 47, clause 2, subdivision a of the Bankruptcy Act would not have affected the case.

In re John Deere Plow Company, 137 Fed. 802 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt agreed to pay for the goods in par funds, or give notes therefor.

(b) The bankrupt dictated the prices.

(c) No agreement segregating the goods.

(d) Proceeds of sales kept separate.

(e) Case decided in 1905, following a Missouri statute providing that conditional sales should "be void as to all subsequent purchasers in good faith, and *creditors* unless acknowledged and recorded." It is apparent, therefore, *that the amendment of 1910 to section 47, clause 2, subdivision a of the Bankruptcy Act would not have affected the decision.*

In re Columbus Buggy Company, 143 Fed. 859 (U. S. C. C. A., Eighth Circuit).

(a) Bankrupt paid wholesale price less 5%.

(b) The bankrupt dictated the prices.

(c) No agreement limiting the mingling of goods.

(d) The bankrupt was to pay the Columbus Company the wholesale price less 5% discount.

(e) Case decided in 1906, following an Oklahoma statute rendering voidable at the instance of innocent purchasers or *creditors* of the vendee, a contract evidencing a *conditional sale,* unless deposited in the office of the registrar. The court held it to be a bailment, and the statute therefore did not apply.

> "Such a contract is not affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers."

The decision would not have been affected by the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act.

Dunlop v. Mercer, 156 Fed. 545 (U. S C. C. A., Eighth Circuit).

(a) Notes were given by the Western Company, which was the bankrupt.

(b) The bankrupt dictated the prices.

(c) The goods were mingled with bankrupt's other goods.

(d) The accounts and bills receivable belonged to petitioner, to be held as collateral and credited on the notes of the Western Company, the bankrupt.

(e) The decision was rendered in 1907, construing a Minnesota statute which provided that failure to record a contract of *conditional sale* rendered it voidable by attaching and judgment creditors and *bona fide*

purchasers. The court found that under the law of Minnesota there were no *bona fide* purchasers, attaching creditors or judgment creditors; it, therefore, being a valid contract of conditional sale, the title had not vested, and the petitioner recovered. Having applied the laws of the state, the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act would not have affected the decision.

In re Pierce, 157 Fed. 757 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt was to guarantee the notes of purchasers.

(b) The bankrupt sold on specified terms.

(c) Nothing in the contract which prevented the mingling of goods.

(d) The bankrupt agreed to remit all cash received, less commission, and to make settlement for all implements ordered, at the close of the season, or whenever requested by petitioner.

(e) Case decided in 1907, and the court held the contract to be one of bailment for sale. It is not shown in what state the case arose. The court held that the trustee had no greater title than the bankrupt had.

In re Stoughton Wagon Works, 168 Fed. 857 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt gave notes for net amount of goods on hand per statement, due in six months' time.

(b) The bankrupt dictated the prices.

(c) Nothing preventing the mingling of goods.

(d) The bankrupt to report each month and to accompany the report with a full settlement for all goods reported sold, in cash and promissory notes at four months. The proceeds of all sales belonged to petitioner.

(e) Case decided in 1909. The court held it to be a contract for bailment or agency only, and that the title did not pass to the trustee.

In re Gray, 170 Fed. 638 (District Court, Oklahoma).

(a) The bankrupt gave his notes for the unpaid part of the purchase price.

(b) The bankrupt agreed *"to make settlement in accordance with prices herein specified within ten days from date of invoice, either in cash * * * or by notes, in accordance with the terms hereinafter specified."*

(c) The bankrupt was given unlimited power to sell the property in the course of his business as a merchant, nothing preventing the mingling of goods with his own.

(d) It being a contract of conditional sale the accounts and bills receivable belonged to the bankrupt.

(e) Case decided in 1908. The sale made in Oklahoma, the property delivered in Indian Territory, and not required to be recorded under the local law, the court held the contract valid between the parties, and as against third persons. The court applied the local law. Therefore, *the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act would not have affected the decision.*

In re Bailey, 176 Fed. 628 (District Court, South Carolina).

(a) Notes were not given, but the bankrupt agreed to pay for the paint when sold at the end of sixty days.

(b) Nothing to indicate petitioner controlled the price at which sold.

(c) Nothing to prevent the mingling of goods.

(d) Nothing indicated as to accounts and bills receivable because the bankrupt was to pay for the goods.

(e) Case decided in 1910, construing a South Carolina statute, the full statute concerning which is covered by the first syllabus:

> "Under Civ. Code S. C. 1902, sec. 2655, which provides that every agreement of purchase or bailment of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be void 'as to subsequent creditors or purchasers for a valuable consideration without notice,' unless in writing and recorded as required of mortgages, *as construed by the Supreme Court of the state,* an agreement of *consignment* under which goods were delivered to a bankrupt to be sold and accounted for as agent, otherwise valid, is not void as against the bankrupt's trustee, or general creditors, because not recorded."

The court followed the state law, and hence the amendment of 1910 to section 47, clause 2, subdivision a, of the Bankruptcy Act could not have changed the decision.

In re Smith, 192 Fed. 574 (District Court, Maryland).

(a) The agent or purchaser to give notes.

(b) Minimum price given, but nothing to prevent agent from selling at any higher price if he chose to do so.

(c) Nothing to prevent mingling of goods.

(d) The bills and accounts receivable belonged to the bankrupt because the contract provided for a cash settlement and a somewhat larger price for settlement by note.

(e) Case decided subsequent to the amendment of 1910 to section 47 of the Bankruptcy Act. There was no Maryland statute upon the subject. The court held it to be one of consignment to the bankrupt as agent.

In re Farmers' Co-operative Company, 202 Fed. 1005 (District Court, North Dakota).

(a) Nothing to indicate notes were given.

(b) The bankrupt dictated prices.

(c) The goods were mingled with the bankrupt's goods.

(d) The accounts and bills receivable evidently belonged to the bankrupt because it was a conditional sale with reservation of title in the petitioner until paid for.

(e) The case was decided in 1913, the first syllabus being:

"Bankruptcy Act July 1, 1898, c. 541, sec. 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, sec. 8,

36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests a trustee as to all property in the custody or coming into the custody of the bankruptcy court with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, does not give him a right to property in the possession of the bankrupt but not paid for, which was delivered to him under a contract of conditional sale reserving title in the seller until payment of the price, and which was recorded in accordance with the laws of the state prior to the bankruptcy."

Wood v. Vanstory, 171 Fed. 375 (U. S. C. C. A., Fourth Circuit).

(a) The bankrupt was to account for goods sold upon making his annual settlement.

(b) The bankrupt sold to his customers upon his own terms.

(c) Nothing to indicate that goods were not mingled with his own.

(d) Evidently the bills and accounts receivable belonged to bankrupt because the machines sold "were charged to the bankrupt." When the yearly inventory was taken the bankrupt was required to make settlement for the same.

(e) Case decided in 1909, holding that the contract was one of bailment, more fully expressed by the third syllabus:

"Petitioner, a manufacturer of farm machinery, shipped machines by the carload to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the

same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, and *machines, when so sold, were charged to it.* At the end of the year an inventory was taken by petitioner of the machinery then on hand in storage. *Held,* that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt's trustee."

In re Reynolds, 203 Fed. 162 (District Court, Kentucky).

(a) For goods sold on time the agent executed notes due in four months for the invoice price.

(b) A minimum price was fixed but not a maximum price at which the goods might be sold.

(c) Nothing to prevent mingling of goods.

(d) Bills and accounts receivable to be the property of petitioner.

(e) The case was decided in 1912. Construing the amendment to section 47a in 1910 the court said:

"It is only on the basis that it was a *bailment for sale* that the petitioner was entitled to any relief. I think that the contract was a bailment for sale under these authorities." (Citing a number of cases.)

Berry Bros. v. Snowden, 209 Fed. 336 (U. S. C. C. A., Ninth Circuit).

(a) The bankrupts "agree to pay for such goods sold by them" each month from said stock, "or take over consigned goods while in their possession on the terms at which they are billed by the party of the first part on their regular invoice."

(b) Nothing to indicate prices were not dictated by bankrupt.

(c) Nothing to indicate goods were not mingled with their own.

(d) Accounts and bills receivable evidently belonged to bankrupts, who agreed to pay for the goods sold by them.

(e) Case decided in 1913, construing which the court said:

> "And while it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a trustee in bankruptcy is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the *property of the bankrupts* and *not* a *lien* on the *property of third persons.*"

It is significant that the court held the contract to be one of bailment "under which *title did not pass to any of the goods except those removed by, and regularly billed to, the bankrupts.*"

In re Lane Lumber Company, 217 Fed. 550 (U. S. C. C. A., Ninth Circuit).

The first and second syllabi are:

1. "Under Rev. Codes Idaho, Secs. 3441, 3443,

which give a vendor a lien on real property sold 'valid against every one claiming under the debtor except a purchaser or incumbrancer in good faith and for value,' such a lien is valid as against the trustee in bankruptcy of the purchaser."

2. "The purpose of the amendment of Bankr. Act, Sec. 47a (Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), by Act June 25, 1910, c. 412, Sec. 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500)), by providing that as to all property coming into the custody of the bankruptcy court the trustee shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, was to confer on the trustee the power to contest the sufficiency of any claimed lien, pledge, or security that a lien creditor or judgment creditor might challenge had bankruptcy not intervened, but it does *not prescribe any rule* by which the *validity* or *priority* of such liens is to be determined, and a *lien* which is *valid under the state law as against the claims of such creditors is valid under the bankruptcy law against the trustee since the amendment as well as before.*"

On page 552 the court say:

"It is claimed that the effect of this amendment is to vest in the trustee, as against all secret or unrecorded liens, such as that involved, a title and equity in the property, for the benefit of the creditors of a bankrupt, superior in character to that of the lien of the vendor in all instances where the latter has failed to disclose his claim of lien by some appropriate proceeding to enforce it prior to the vesting of the property of the estate in the hands of the trustee. But we think that this con-

tention involves a misconception of the purpose and effect of the amendment in question. Prior to its adoption the trustee was without power to question the validity of an asserted lien upon the property of the estate, however, defective, if the defect were one which could not have been availed of by the bankrupt, the trustee being vested with no higher right as to the property than that possessed by the bankrupt at the time of the devolution of the title upon the trustee. York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and cases there cited. The amendment was obviously designed to cure what was deemed a defect in this regard, and to confer the power upon the trustee, in the interest of the general creditors, to contest the sufficiency of any claimed lien, pledge, or security that 'a lien creditor or a judgment creditor might challenge had bankruptcy not intervened.' Loveland on Bankruptcy (4th Ed.), Sec. 372. There is nothing in the amendment indicating that its purpose was to prescribe a rule by which the validity or priority of such liens is to be determined or enforced. In that respect the law is left untouched, and the validity and rank of the lien is now to be ascertained by the same applicable principles as obtained prior to the change; and 'a lien which is valid under the state law as against the claims of such creditors, is valid under the bankrupt law as against a trustee since the amendment as well as before.' *Id.* The amendment, in other words, was designed only to clothe the trustee with the right to question the validity of any lien claimed against the property of the estate which may be defective under the law creating it, notwithstanding the bankrupt might have been estopped to do so. Pac.

State Bank v. Coates, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846. It goes no further. It does not affect the character of the trustee's title as such That is defined in section 70 of the act, which clothes the trustee only 'with the title of the bankrupt as of the date he was adjudged a bankrupt.' "

General Electric Co. v. Brower, 221 Fed. 597 (U. S. C. C. A., Ninth Circuit).

(a) The bankrupt was to pay for the lamps sold each month less 29% for making the sales. In another provision the bankrupt guaranteed that all lamps sold by it would be paid for.

(b) Prices and terms were fixed by petitioner.

(c) Nothing to prevent the mingling of goods with its own.

(d) "Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other monies, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month less 29% for making the sales."

(e) Case decided in 1915, arising in the state of Washington.

It is evident that since it was a contract of bailment for sale, following the principle laid down in Berry Bros. v. Snowden, *supra,* any right which the trustee might have had under the amendment of 1910 of section 47a of the Bankruptcy Act, it would only apply as to "the property of the *bankrupts* and not the *property of third persons.*"

In re Ellet-Kendall Shoe Co. v. Martin, 222 Fed. 851 (U. S. C. C. A., Eighth Circuit).

(a) The bankrupt agreed to make weekly reports, and accompany said report with check covering payment for goods sold.

(b) Sales made at the net marked prices.

(c) Nothing to prevent mingling of goods.

(d) Accounts and bills receivable evidently belonged to the bankrupt because of their agreement to pay for the goods sold.

(e) Case decided in 1915. The contract was never recorded.

As to the rights under section 47a as amended the court on page 855 say:

> "Counsel for appellee apparently concede that if the transaction of June 12 (date of the contract) was in effect a *consignment* of the shoes by the petitioner to the bankrupts for *sale on commission*, the petitioner would be entitled to recover the shoes not sold at the time of the bankruptcy or to the proceeds if sold by the trustee."

In re National Home and Hotel Supply Co., 226 Fed. 840 (District Court, Michigan).

(a) Apparently no notes were given.

(b) Bankrupt fixed the retail prices and terms of sale.

(c) Petitioners' wares were not kept separate from other goods in bankrupts' store.

(d) No reservation of the title to the proceeds of the goods sold, nor was the bankrupt required to keep separate, or remit the identical money taken in on sales

of petitioners' goods, and bankrupt comingled said proceeds with its general funds.

(e) Case decided in 1915. Construing the amendment of 1910 of section 47a of the Bankruptcy Act, HELD, that said amendment does not divest title of the bailor.

On page 848 the court say:

> "This point was passed upon *In re* Wright-Dana Hardware Company, 211 Fed. 908, 128 C. C. A. 286, 31 Am. Bankr. Rep. 764 (C. C. A., Second Circuit, 1914), affirming (D. C.) 205 Fed. 335, 30 Am. Br. 583, wherein it was said (in referring to Bankruptcy Act, Sec. 70, Comp. Stat. 1913, Sec. 9654, construed with the amendment to Sec. 47 St. Sec. 9631):
>
> "'We do not, however, understand that this clause includes or was intended to include property in the hands of a bankrupt, bailee, or of a bankrupt agent, who never had the title, but who may have had a right to sell the property for the benefit of his bailor or principal. It is impossible to give the act any such construction. The bailor cannot thus be divested of his title.'"

In re Wright-Dana Hdw. Co., 211 Fed. 908 (C. C. A., Second Circuit).

The fourth syllabus is:

> "Bankruptcy Act of July 1, 1898, Sec. 70, providing that the bankrupt's trustee shall be vested by operation of law with the title of the bankrupt to 'property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process against him,' does not include property in the hands of a bankrupt bailee or of

an agent *who never had title, but who may have had a right to sell the property for the benefit of the bailor or principal.*"

LATER CASES.

In re Charles E. Reeves, 36 Am. Br. 130 (District Court of New York).

The foregoing case is reported in the advance sheets of Volume 36, American Bankruptcy Reports for March, 1916.

In that case the bankrupt, C. E. Reeves, entered into a contract with one Wirt, who agreed to *furnish* the bankrupt an assortment of fountain pens "on consignment," at a *discount of* 40% *from the list,* with rebate privileges. Reeves was to sell the pens at regular retail prices fixed by Wirt, and make remittances each ninety days. By express provision Reeves was liable for all loss from any cause.

> "The agreement to be terminated by Wirt at any time, and in such event Reeves was to '*make payment for all goods sold and not paid for*' (meaning, of course, that Reeves was to pay for such goods as he had sold and failed to remit for, less his rebate), and return all pens not sold, and also showcases, etc., furnished by Wirt."

Forty-eight pens were delivered, accompanied by an invoice reading as follows:

> "Paul E. Wirt. Fountain Pen Terms: Remit every 3 months for goods sold.
>
> "Bloomsburg, Pa., Aug. 26, 1912.
>
> "Sold to Mr. Chas. E. Reeves, 61 Chenango St., Binghamton, N. Y.: (Here followed an itemized list of 48 pens, with prices.)"

"The invoice in its terms and language plainly imparts an absolute sale of the pens, but read in connection with the agreement referred to it is plain that Reeves received and held the pens for sale on consignment, and that the trays, etc., belonged to Wirt; the title to the pens being in Wirt."

The proceeding was to reclaim the pens on hand at the time of the bankruptcy of Reeves. The first syllabus states the rule and the law of the case:

"A manufacturer of fountain pens agreed, in writing, to furnish them 'on consignment' at a discount, with rebate privileges, the consignee to sell them and make remittance at stated intervals. It is expressly provided that the consignee should be responsible for any and all loss from any cause whatever. The invoice stated that the pens therein described were *sold to the consignee.* HELD, that while the invoice in its terms imparted an absolute sale, when read in connection with the agreement, it is plain that the consignee held the pens for sale on consignment, and that title remained in the consignor, and did not pass to the consignee's trustee in bankruptcy."

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (U. S. C. C. A., Fifth Circuit).

The foregoing case is found in the advance sheets of the Federal Reporter of date February 24th, 1916.

In this case the Cole Company made an agreement with Hurst to become the distributor of the Cole Company's automobiles for certain counties in Texas. Failing to remit, the suit was against Hurst and his guarantor.

The proceeding was not in bankruptcy.

The contract provided that Hurst was to be paid a commission on each sale; *to remit to plaintiff for each car as it was sold by him; the cars to be invoiced to him at a price to the purchaser fixed in advance by the Cole Company.*

The question presented was: Did the contract constitute Hurst as agent or consignee, or did it evidence a sale of cars to him?

Hurst agreed that if he cancelled the contract he would take and pay for all cars on hand or in transit.

> "As to the amount of Hurst's interest it appears that the goods were to be *invoiced* to him at the regular catalogue price subject to a discount of 25%. *This discount, of course, constituted his profit,* unless, in deed, he sold the cars for less than the catalogue price, in which event *his commission was to be the difference between the price at which the cars were sold,* and the discount, after the list price had been taken off, which was *the invoice price.*"

On page 282 the court say:

> "That the plaintiff regarded the contracts as of consignment is made plain by the fact that *the original action is brought as upon contracts of consignment.* When, however, the court, over the plaintiff's objection and exception, held them to be contracts of sale, the plaintiff was driven to proceed as if they were sale contracts. Having saved its exception, this was its only resource, and we are not precluded by this enforced change of attitude from regarding the contracts in their true light. *Indeed, if there were two reasonable interpretations of the contract, one defeating the plain-*

tiff's meritorious claim, and the other enforcing it, the court would be at liberty to adopt the latter."

The third syllabus is:

"Contracts between a manufacturer of motor cars and a dealer, designated as a distributor, provided that *cars would be invoiced to the distributor at the regular catalogue price,* subject to certain discounts constituting his profit; that he should have the exclusive right to sell the manufacturer's cars in certain designated territory within the state of Texas, and not elsewhere; that remittances for all cars shipped to him would be made the same day that the cars were sold; that, when cars were shipped direct to his agents, sight drafts would be drawn and a check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments had been received during the previous week; that the distributor would keep the cars insured in the manufacturer's name until sold and paid for; that if the contract was cancelled the manufacturer would take over any new cars then on the distributor's floor at the invoice price with carload freight added; and that if the distributor cancelled the contract he would take and pay for all cars on hand or in transit. The contract was made in Indiana, and the cars to be shipped from Indiana f. o. b. to the distributor in Texas. HELD, that the transaction was a consignment, and not a sale, and the contract was an interstate one the validity of which was covered by the federal anti-trust laws and not by the anti-trust laws of Texas."

Resume.

The following points are especially cognizable in nearly all the cases cited, *including the facts of the case at bar.*

1. a. In most of the cases notes were given by the bankrupt.

b. Notes were given by the bankrupt in the case at bar.

2. a. In nearly all of the cases cited the bankrupt dictated the prices or terms upon which the goods were sold, excepting that in most of the cases a minimum price was fixed.

b. In the case at bar the minimum prices were fixed by the tenth paragraph of the contract of 1911 (p. 92) but the bankrupt might sell at any higher price he chose.

3. a. In most of the cases cited the mingling of the goods was considered by the court to have no legal effect whatever.

b. This was somewhat true in the case at bar, except that there was testimony that there were signs up with The Miller Rubber Company's name on them (p. 40).

4. a. In many of the cases there was no agreement that the accounts and bills receivable belonged to the consignor for the reason that the consignee was to give notes or pay cash for all goods sold by him.

b. In the case at bar the 1911 contract provided "remittances to be mailed to first parties on the tenth of each month for previous month's sales" (par. 6, p. 91).

5. a. Some of the cases cited by us were decided prior to the 1910 amendment of section 47a of the Bankruptcy Act, and a number of them after said date. Following the construction of section 47a as placed upon it by this Honorable Court *In re* Lane Lumber Company, 217 Fed. 550, we urge that "there is nothing in the amendment indicating that its purpose was to prescribe a *rule* by which the *validity* or *priority* of such liens is to be determined or enforced. *In that respect the law is left untouched,* and the validity and rank of the lien is now to be ascertained by the same applicable principles as obtained prior to the change, *and a lien which is valid under the state law as against the claims of such creditors,* is valid under the bankrupt law as against a trustee, *since the amendment as well as before it.*"

It might be added that in most of the cases cited by us, and decided previous to the amendment of 1910 of section 47a of the Bankruptcy Act, the question properly arose under the construction of a state statute, which rendered certain contracts voidable as to purchasers, incumbrancers and *creditors,*—the cases having been decided upon the ground that, since the property belonged to *a third person, and valid as against all the world,*—that its validity could not be impugned by the trustee. The rule would not be changed, therefore, by the 1910 amendment of section 47a.

b. Assuming that the case at bar hinges upon the law of California with reference to the reservation of title in the consignor, the question of whether the property to be consigned was for *sale* or *consumption* seems quite immaterial for the reason that if it belonged to

a *third person,* it would be valid as against either the bankrupt, his execution or attaching creditors, and also his trustee in bankruptcy.

On page 22 of opposite counsel's brief the rule in California is stated to be against "upholding secret liens and charges to the injury of *innocent purchasers, or incumbrancers for value.*"

In Liver v. Mills, 155 Cal. 459, cited by opposite counsel, the contract did not contain the provision, as expressed in the case at bar, on default of the vendees the vendors might retake possession. It lacked that main element favorable to the consignor.

The first and second syllabi are:

> 1. "The validity of conditional sales of personal property is fully recognized in this state; and even *bona fide* purchasers from one to whom personal property has been delivered upon conditional sale, under an executory contract, reserving title in the vendor until the purchase money is fully paid, obtain no valid claim to the property superior to the rights of the original purchaser."
>
> 2. "When a contract for the sale of personal property expressly reserves title in the vendors until the purchase money is paid the title carries with it the right of possession in case of default, though such contract does not contain the usual provision to that effect."

These cases being upon contracts of conditional sale, with greater reason may the petitioners recover the property in this case, having placed it with the bankrupt on consignment for sale only, and with no intention of parting with title to the bankrupt, reserving

title "until sold and delivered to bona fide customers in the usual manner" (par. 4, p. 91).

FRAUD.

6. a. In all of the cases cited the question of fraud was not raised.

b. In the case at bar counsel have not even attempted to raise the question of fraud in the dealings of the parties herein, whereby the property was placed with the bankrupt under the 1911 contract for sale in the usual manner.

GIVING OF NOTES.

We have referred to the giving of notes as not being a material element necessarily showing a sale, when due consideration is given to the entire contract. It is true that the seventh paragraph of the contract of 1911 (p. 92) provides that notes will be accepted for all purchases made by the bankrupt.

However, when read in connection with the entire contract it was evidently the plain intention of the parties, as stated by Mr. Justice Caldwell in Met. Nat. Bank v. Benedict, 74 Fed. 182, that money to be paid was not upon a sale of the goods *to* the bankrupt, but upon a sale of the goods *by* the bankrupt; and in all of the cases which we have cited, the giving of the notes in accordance with such an agreement *to pay* for the goods by the bankrupt, *did not have the effect of passing title to the goods on hand; but was only an additional security guaranteed to the consignor of the goods by the mutual agreement of the parties, following Sturm v. Boker,* 150 U. S. 312.

In Leschen v. Mayflower, 173 Fed. 855 (U. S. C. C. A., Eighth Circuit), certain materials were delivered by Leschen to a mining company, defendant, with the reservation of title and the right to take possession thereof "in default of the last payment being made." The mining company made all payments, except the last, and gave its note for that, but never paid the note. After the note was dishonored the Leschen Company replevied the materials and the District Court dismissed the action upon the ground that the mining company—the defendant—had made the last payment in accordance with the agreement *by giving the note.* On appeal the U. S. Circuit Court of Appeals held that the title was reserved, notwithstanding the giving of the note, and reversed the case for further proceedings in accordance with its decision.

1914 Contract.

Counsel having referred to the 1911 contract, and the termination thereof, in their brief, on page 47, say: "If the contract of 1911 were terminated by the contract of 1914, such termination would not alter the status of the goods shipped under the 1911 contract, and *on hand* at the time of the filing of the petition in bankruptcy." The statement assumes a common fallacy. By the express provisions of the contract of 1914, viewing it in connection with all the facts stated by us in our opening brief, page 55 *et seq.,* we cannot conceive upon what possible ground it might be said that the 1911 contract was maintained after June 11th, 1914, for any purpose *"except as to the unpaid ac-*

counts"—the unpaid accounts having been expressly reserved in the cancellation of said contract (p. 140). The assumption of counsel, quoted above, would lead to the conclusion that there was a direct hiatus in the status of the goods on hand at the time of the filing of the petition in bankruptcy, and now claimed by petitioners, between June 11th, 1914, and March 20th, 1915,—the date of the filing of the petition in bankruptcy—which would be an absurd conclusion.

Every fact and circumstance in connection with the making of, and the carrying out of, the 1914 contract clearly shows the intention of the parties concerned "to make a new slate entirely" as of the date of the 1914 contract, except as to the unpaid accounts.

Commissions.

In counsel's brief, page 11, in reference to the commissions alleged to be due to the bankrupt from The Miller Rubber Company of California, which finding and decision of the special master was reversed by the District Court, and which is the basis of the trustee's appeal—the facts are incorrectly stated. Counsel makes the direct statement that "the price at which the goods were *actually sold* was $95.00, and that Newerf's compensation, instead of $35.00, should be $30.00." Counsel assumes that Mr. Newerf would bear the loss of the entire $5.00.

The facts are these: The contract provides (p. 98) that the bankrupt's commission is to be the difference between the price at which goods are *actually sold* and 10-12½-12½-5% from the price list. 10-12½-12½-

5% off price list leaves a price of 65.46%. The difference between this and price list—100%—leaves bankrupt at all times entitled to 34.54% of the actual selling price of the goods.

The District Court must have found from all of the facts of the Mushet Audit Company—which made a complete audit, as shown by the record (p. 82), taking the bankrupt's view of the facts, and The Miller Rubber Company's view of the facts (p. 21),—that the computation made by said Mushet Audit Company was *based upon the cash received.*

Now, if goods were sold and invoiced at $100.00, and the customer took advantage of the 5% and paid $95.00 cash, the bankrupt's commission would be 34.54% of $95.00, or $32.81. The Miller Rubber Company would obtain 65.46% of $95.00, or $62.19. There is, therefore, $5.00 which is *lost* to the bankrupt and to The Miller Rubber Company. The Miller Rubber Company would lose the difference between $62.19 and $65.46, or $3.27. The bankrupt would lose the difference between $32.81 and $34.54, or $1.73.

So, that, it being an equal advantage both to the bankrupt and to The Miller Rubber Company to obtain collections, since each was interested proportionately, each lost proportionately, when the customer paid cash. We know of no more equitable rule than the foregoing; and this is the exact conclusion which we urge is the only one to be reached and which the District Court concluded is correct.

The parties used the words "actually sold" and "price list" (p. 98) for the evident purpose of dis-

tinguishing between *price list* or *invoice price*—both being usually the same—and *the actual amount of money received* for sales made by the bankrupt, so as to give the bankrupt 34.54% of the *actual amount of money received for a sale.* If they had wanted to give him 34.54% of the *price list,* or *invoice price,* they certainly would not have incorporated into the contract the provision that his commissions are "the difference between the *price* or prices at which goods are *actually sold* and 10-12½-12½-5% from the *price list.*

Further, it will be borne in mind, and is conceded and claimed by counsel for the trustee, that Newerf was not hampered as to the price at which he sold goods, except as to the *minimum* price. He might have sold goods and received in cash 110% of the list price. In that case his commission would properly be 34.54% of $110.00—using the concrete figures.

It will be seen that the bankrupt sold approximately $90,000.00 worth of goods based upon the invoice price—but received therefor approximately $85,500.00 *in cash,* the customers for said sales having taken advantage of the 5% discount. The trustee claims Mr. Newerf should have 34.54% of $90,000.00, whereas his sales amounted to $85,500.00. It seems to us to take this view of the case not only gives the bankrupt *something for nothing,* but violates the plain language, intent, meaning and purpose of the contract between the parties.

Conclusion.

Concluding, therefore, we respectfully urge all the matters and facts set forth in our opening brief, especially at pages 68 and 69, and ask for judgment accordingly.

Respectfully submitted,

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